

REPORTER'S RECORD

VOLUME 5 OF 21 VOLUME(S)

TRIAL COURT CAUSE NO. 1376988P

COURT OF APPEALS CASE NO. 02-14-00412-CR

FILED IN
2nd COURT OF APPEALS
FORT WORTH, TEXAS
3/27/2015 12:36:05 PM
DEBRA SPISAK
Clerk

THE STATE OF TEXAS

) IN THE 372ND JUDICIAL

)

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)

)

VS.

) DISTRICT COURT

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THOMAS OLIVAS

) TARRANT COUNTY, TEXAS

PRETRIAL HEARING

On the 9th day of September, 2014, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Scott Wisch, Presiding Judge, held in Fort Worth, Tarrant County, Texas;

Proceedings reported by computerized machine shorthand with assisted realtime transcription.

KAREN B. MARTINEZ, CERTIFIED SHORTHAND REPORTER
Official Court Reporter
372nd Judicial District Court
Tarrant County, Texas

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(*) Denotes an exhibit designated for the record only.

P R O C E E D I N G S

Tuesday, September 9, 2014 9:50 a.m.

(OPEN COURT, DEFENDANT PRESENT)

THE COURT: All right. Prior to proceeding with trial on the merits in Cause Number 1376698R, the State versus Thomas Olivas, a couple of housekeeping matters.

First of all, I would like the record to reflect that all the jurors are now assembled in the hall, that the questionnaires, all but I think seven or eight questionnaires, had been completed in advance, were delivered to the parties yesterday, and those individuals who did not follow the online instruction to register have completed manual questionnaires this morning. And everyone is supposed to have all of those.

Is that correct, State?

MR. ROUSSEAU: We do, Your Honor.

THE COURT: And Defense?

MR. MOORE: That's correct.

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(THIS PAGE IS UNDER SEAL)

THE COURT: And the parties are in agreement

1 that 13, 35 and 51 should be excused. And that was done
2 prior to voir dire.

3 Is that correct, State?

4 MR. ROUSSEAU: Yes, Your Honor.

5 THE COURT: Defense?

6 MR. MOORE: Yes.

7 THE COURT: Also, the parties have advised
8 me that they have, no disrespect to Tamla and Joetta,
9 but basically a gentlemen's agreement, if you will,
10 under the old rules, that 36 and 30 are going to be
11 excused for reasons the record doesn't need to reflect
12 other than that both parties are agreeing those people
13 shouldn't serve, and prior to making strikes, they will
14 be struck from the official list by agreement.

15 Is that correct, State?

16 MR. ROUSSEAU: Yes, Your Honor.

17 THE COURT: And Defense?

18 MS. KEENE: Yes, Your Honor.

19 THE COURT: All right. Is there anything
20 else relating to the jury list at the present time that
21 either side needs to address?

22 MR. ROUSSEAU: Not related to the jury list.

23 MR. MOORE: No, not from us.

24 THE COURT: All right. Then one other
25 housekeeping matter. I've been advised several times by

1 Defense Counsel and again this morning that the
2 Defendant -- that's you, Mr. Olivas, you need to listen
3 up. Your lawyers have told me before we went on the
4 record that you have a copy of all the indictments,
5 including the one on trial, you can read and write
6 English, you're able to talk to them about it, and
7 they're going to waive a formal reading of the
8 indictment until the jury is sworn and the trial on the
9 merits commences, and is that all right with you, sir?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: And they're going to waive
12 what's called a formal arraignment, where I read the
13 charges in open court and you enter a plea, and your
14 lawyers are simply going to enter pleas of not guilty to
15 all charging paragraphs of this 1376698R indictment, and
16 that would be four separate paragraphs, and they're
17 going to do that on your behalf, and I assume that's all
18 right, too?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: And so do you officially waive
21 arraignment and enter those pleas at this time,
22 Mr. Moore?

23 MR. MOORE: Yes.

24 THE COURT: All right. Let the record so
25 reflect formal arraignment waived, not guilty pleas

1 entered before voir dire.

2 I see prior to voir dire that Defendant has
3 filed with the Clerk of the Court a sworn application
4 for community supervision if convicted; a sworn request
5 prior to voir dire that if convicted of anything less
6 than capital murder that, A, could be probation eligible
7 depending on charge; B, wants jury sentencing if
8 sentencing involves a range of punishment; and both
9 sides have signed an agreement that if the jury writes
10 notes during deliberations, they can be answered in
11 writing after reviewed by the parties without bringing
12 them into the courtroom.

13 Does the Defense agree with all those
14 statements and what's in the clerk file?

15 MR. MOORE: We do.

16 THE COURT: And does the State agree with
17 agreement on notes?

18 MR. ROUSSEAU: Just with the observation
19 that a potential lesser is murder for which probation is
20 not a possibility anyway, but with that, yes, Your
21 Honor, I agree.

22 THE COURT: I mean, you know, in all
23 fairness, based on the nature of the indictment and
24 depending of course on the facts, in the hypothetical
25 world, you might have charges involving the underlying

1 felony and not the death, and vice versa, some of which
2 would be probation eligible, some not, and depending on
3 what gets charged in the event of something that were
4 applicable, I think Defense is aware, as the Court is,
5 based on the offense date, murder is no longer a
6 probation eligible offense. That's no surprise to
7 anyone.

8 Is that correct, Mr. Moore?

9 MR. MOORE: That's correct. We don't intend
10 to go into it on voir dire, quite frankly.

11 (Pause in proceedings)

12 THE COURT: Okay. All right. On the
13 record.

14 Are there any legal issues either side needs
15 to address to the Court since the jury panel, those that
16 remain that haven't been excused, is now assembled, from
17 the State?

18 MR. ROUSSEAU: We have a motion in limine,
19 Your Honor, for voir dire purposes regarding extraneous
20 information regarding the victim, Asher Olivas. This is
21 a capital murder alleging the death of two individuals
22 in a single criminal episode. The fact of the matter
23 is, the two victims are mother and 13-month-old son.
24 There is no allegation in the indictment regarding the
25 age of the victim, that is, Asher Olivas, which could

1 have elevated into a capital murder based strictly on
2 his age. We have not made that allegation. So the only
3 thing before the jury is, for the jury to consider is,
4 whether or not there were two single victims in the same
5 criminal transaction.

6 For that reason, I would object to any
7 mention of the age of the victim, of Asher Rion Olivas,
8 during jury selection. If there's any need to address
9 particularized knowledge any individual juror might have
10 from publicity or any other source, I would request you
11 simply bring those individuals up and find out what that
12 information is rather than inform the entire jury panel
13 that we're talking about a child under the age of ten.
14 We can discern what it is they know and whether it's a
15 problem without informing everybody of the age of the
16 child.

17 THE COURT: What about the generic question,
18 "Does anyone have any problem giving full and fair
19 attention to an offense if the facts they happen to hear
20 involve a victim who might have been a child versus an
21 adult"?

22 MR. ROUSSEAU: That is --

23 THE COURT: The generic question.

24 MR. ROUSSEAU: That's a binding question,
25 Your Honor. It's asking them to resolve or not resolve

1 an issue based upon a fact that's not a part of the
2 indictment.

3 THE COURT: What about the case where the
4 priest is a victim and the Court of Criminal Appeals
5 says the generic issue of what if a priest was a victim
6 could you at least be able to, as a Catholic or
7 otherwise, make an independent and fair assessment and
8 not be distracted by that factor but apply the law to
9 the facts, not what would you do or how would it affect
10 you but just the generic idea of, quite frankly,
11 avoiding a mistrial from I think their viewpoint, if
12 it's someone comes here and someone freaks out,
13 without -- I agree with you about a specific age.

14 MR. MOORE: I agree with that, Your Honor.

15 THE COURT: Just a generic issue, if you
16 were to hear evidence that a victim of a crime whether
17 it was an adult or a child, would it make any difference
18 to you, without saying in this case it is or it isn't,
19 since we're not supposed to be saying what is or isn't
20 anyway.

21 MR. ROUSSEAU: I still think that's too
22 specific. I can see -- and I don't remember -- I do
23 remember the case that you're talking about, the
24 language, but I don't remember what the facts of that
25 case involved.

1 THE COURT: A priest was killed --

2 MR. ROUSSEAU: Was it --

3 THE COURT: Yeah, or a nun. It was a priest
4 or a nun was killed.

5 MR. MOORE: It was a nun.

6 MS. KEENE: Nun.

7 THE COURT: Nun, yeah. And I think people
8 have said priest before like for voir dire purposes, the
9 same type of thing, or a nun. Because there's a
10 potential visceral response that any person of faith,
11 Catholic or not, or other -- that's like a helpless-type
12 category, is there an emotional reaction that would keep
13 you from making an objective determination, but not
14 whether it's an old nun or a novitiate or whatever the
15 circumstances, but just the generic question.

16 MR. ROUSSEAU: Okay. Well, my position,
17 Your Honor, is still that it's too specific to the facts
18 of our case. It's a lightning rod issue that the jury
19 will not be asked to consider. It's not a part of the
20 indictment. And it's something that frankly is going to
21 serve no purpose other -- we're not even able to flesh
22 out the details.

23 THE COURT: I understand.

24 MR. ROUSSEAU: So it's going to do nothing
25 more than cause a knee-jerk reaction from the people.

1 THE COURT: Or find out if someone says if
2 there's a nun that's a victim don't ever call me because
3 I could never be fair no matter what the facts are.

4 MR. ROUSSEAU: Sure.

5 MR. MOORE: And, Judge, in response, I do
6 plan on putting the indictment and the elements up to
7 discuss with the jury.

8 THE COURT: And I understand that, and I
9 think --

10 MR. ROUSSEAU: I do, too.

11 THE COURT: -- in Kevin's defense, he could
12 have charged a child under six, he could have charged in
13 the course of an arson, he could have charged all kinds
14 of different theories of capital murder, and this
15 indictment is very clean and it's a multiple death, same
16 criminal episode, and so it doesn't matter as a matter
17 of law on their burden of proof. It's only an issue of
18 whether there is a due process and effective assistance
19 of counsel thing that kind of stretches and modifies the
20 general non-binding rules of jury selection. It isn't
21 binding of what would you do in this case. It's if the
22 general concept of the victim were a female or a child
23 or anything could you emotionally make an objective and
24 fair decision, or a nun or someone that would fit into a
25 subcategory, or of the race of a person, the general

1 question, would that affect your ability to be fair and
2 make an objective and fair decision and let the chips
3 fall where they may.

4 In the case about the nun and a couple of
5 companion cases clearly say you can throw out general
6 categories, does anyone have problems with general
7 categories of accused or victims, and that you're not
8 letting age or race or sex affect your ability to make a
9 decision. And, quite frankly, I hear every day good
10 lawyers on both sides talk about that the person on
11 trial might be Arab-American or African-American or
12 Asian-American, does that cause anyone a problem. And
13 the fact is, that's a fact and that's binding in a way,
14 but it's not asking will you hold it against him but do
15 you have a problem with the category of someone's
16 ethnicity, and I don't see this as being any different.

17 MR. ROUSSEAU: Well, then --

18 THE COURT: Because you're not talking about
19 "this defendant" any more than your particular victim.

20 MR. ROUSSEAU: I'm sorry, Your Honor, I
21 didn't mean to interrupt you.

22 THE COURT: That's okay. I kept going.
23 That's my fault, too.

24 MR. ROUSSEAU: The distinction I would draw
25 there, and if I misheard you, I'll stand corrected, is

1 that with those, I believe you were talking about the
2 defendant on trial --

3 THE COURT: Or a victim.

4 MR. ROUSSEAU: -- is they're usually visible
5 to the jury.

6 THE COURT: I know, but it still doesn't
7 count. He doesn't count. We're not talking about his
8 case; we're talking about any case. The rules of voir
9 dire -- and I know, human nature, people say, including
10 the State and the Defense, people of good conscience who
11 try to follow the rules, say "this defendant has a right
12 to remain silent, would anyone punish him". No, it's
13 not "this" defendant; it's "any" defendant. It would be
14 objectionable to make reference, for them to their
15 client or you to their client, but people aren't doing
16 it make reference to him because that's, as you're
17 saying, the common sense, that's the person who's here,
18 and all citizens have the right, but if you look at the
19 voir dire rules, it's not talking about him or your
20 victim or anyone else. It's talking about any case with
21 any victim and any defendant. And people always
22 personalize it just subconsciously because that's how we
23 have conversations in life, including with jurors. It's
24 not meant to bypass the rules, but that's why nuns as a
25 category is okay, children as a category might be okay

1 but not whether it's a two-year-old or a 12-year-old,
2 not whether -- you know, "clergymen" as a general rule.
3 There are categories that are allowed.

4 And, first of all, his point as to under six
5 is well-taken. That is irrelevant as a theory of proof.

6 What is it you wanted to do and then I'll
7 let him object if --

8 MR. MOORE: Basically exactly what you -- I
9 intend to have the elements, the four charging
10 paragraphs, and explain to them what the State's burden
11 is and -- but I did plan to go into the fact that one
12 victim -- how would that affect you if a victim was a
13 child.

14 THE COURT: Not to go into the fact --

15 MR. MOORE: Not to go into the age, the
16 facts or anything. I just I think I'm entitled to say
17 this because, you know, if it leads to a preemptory
18 challenge, or even if you say it's binding, if it leads
19 to a challenge for cause, I think it's still proper.

20 THE COURT: Well, and I will just say this.
21 The way you prefaced your question is probably the
22 reason for his limine motion, is it is a fact. You
23 don't get to say the victim in this case is a child.
24 You get to say in any case you have to make a decision
25 whether --

1 MR. MOORE: Right.

2 THE COURT: -- someone is a senior citizen
3 or a child or an in-between age, whether they're healthy
4 or other, you're supposed to decide what do the facts
5 prove and does anyone have a problem if in a case
6 someone is elderly or someone is a child or someone is
7 disabled; in making an objective decision, what are the
8 facts and do they prove anyone committed a crime and not
9 be emotionally affected and sway the facts by the status
10 of a victim or a defendant or anyone else in any case.
11 The generic question is allowed. The saying "in this
12 case the victim is a child," I think crosses the line.
13 "In this case the victim is a nun" crosses the line. If
14 you say, "What if the victim were like a nun or an old
15 person, does that cause a problem," I think it doesn't
16 cross the line, because if someone says, hey, if anyone
17 ever did anything to a nun, I am not going to
18 objectively be able to make a guilt or not guilty
19 decision," or "follow an objective range of punishment,"
20 "my emotional, spiritual," whatever, "is going to take
21 over and I can't make a cool, collected decision based
22 on the law and the facts". And if you phrase that in a
23 term of would the age of a person affect your ability to
24 do that, whether it be a child or whatever, if it's put
25 in the generic context of "your duties are the same,

1 whether the victim is three days old or 103 years old,
2 your rules are the same," I don't have a problem with
3 generically making sure -- and, quite frankly, I don't
4 have a problem preventing mistrials, either. Because
5 what happens when that happens is that person crosses
6 their arms in the jury room at the end of the trial and
7 says, "A kid, there is no flexibility," and then you
8 have jury misconduct and you do it all again.

9 So it's granted in the context of talking
10 about "this particular case the victim is..." versus "if
11 in a case is the age of a victim going to affect your
12 ability to objectively make a decision." If you use
13 examples of a child or elderly or anywhere in between,
14 some people -- and you can point out, "Some people have
15 sympathy for the elderly and it clouds their vision to
16 decide are they even a victim or not, or certainly did
17 the person on trial do anything or not," because you see
18 an old person, you give sympathy and you're not
19 objective anymore, or sometimes as a child that's a
20 victim. It clouds your objectivity. Just like the
21 things with cops, you can handle it the same way, is if
22 you're going to call police officers, "if anyone has a
23 problem trusting the testimony of a police officer,"
24 well, that's kind of binding but it's not really because
25 it's not "will you believe Officer Flores, homicide

1 investigator". It's "will you automatically believe or
2 disbelieve a cop because of their status as a cop
3 because of some life experience". It's the same issue
4 with having a child or an elderly victim or defendant of
5 a particular race or sex or creed that offends someone's
6 personal sensibilities that wouldn't affect a fair and
7 objective juror.

8 So granted in part, denied in part to the
9 generic question.

10 Anything else?

11 MR. ROUSSEAU: Offhand, I cannot think of
12 anything else, Your Honor.

13 THE COURT: All right.

14 MR. MOORE: This can be off the record.

15 (Discussion off the record)

16 THE COURT: One last housekeeping matter on
17 the record.

18 I have been advised by the parties and the
19 court reporter that the CD/DVD, electronic recording of
20 the various phone calls that were discussed and subject
21 to the motion for continuance, have been surrendered to
22 the court reporter. It's marked as Court's Pretrial 1.
23 And I want the record to reflect those are the items
24 that were the subject matter of the continuance motion
25 and the discussion surrounding the same.

1 (Court's Pretrial Exhibit No. 1 admitted)

2 THE COURT: And, for the record,
3 Mr. Rousseau, that's the only copy, other than the one
4 in the possession of the Defense, that you were aware of
5 that; is that correct, sir?

6 MR. ROUSSEAU: Yes, sir. We are at a
7 disadvantage now.

8 THE COURT: All right. And I will remind
9 the Defense that the limine applies to both sides as to
10 any reference to any calls from the jail.

11 MR. ROUSSEAU: I say that with a grain of
12 salt, Your Honor.

13 THE COURT: I understand that.

14 MR. MOORE: So subject to the ruling of the
15 Court, we're not required to file a motion in limine,
16 and it's my understanding that subject to your ruling
17 that neither party will be able to use any kind of phone
18 recordings?

19 THE COURT: Unless -- there's two things
20 that the Court said yesterday in the midst of a lot of
21 discussion, and I will admit that, between everybody and
22 setting a factual record for your motion, no one makes
23 reference to any calls being made to and from the
24 Defendant in jail to anyone, either receiving them or
25 him making calls. There's no reference to jail calls

1 from either side without approaching the bench and
2 saying here's why it's relevant and here's why it's not
3 going to -- or with the recognition it might change a
4 prior ruling. No one makes reference to the existence
5 of or the contents of anything that's on Court's
6 Pretrial Exhibit 1 other than what's in the record by
7 officers of the Court as to how the exhibit was created
8 in the limited review y'all did in your office. It's
9 off limits unless you approach the bench first.

10 MR. MOORE: Thank you.

11 THE COURT: But that's a two-way street.

12 And in all fairness, too, cannot be used
13 offensively or defensively regardless of the contents.
14 And as Mr. Rousseau points out, they don't have the
15 ability to continue to listen to it. You're allowed to
16 keep your copy in the remote event that at some point in
17 the future there's something that actually would be
18 Brady and you can make a subsequent record. And if not,
19 I'll expect your copy be turned into the court reporter
20 after your review.

21 MR. MOORE: Thank you.

22 THE COURT: All right. Sheriff, lock and
23 load.

24 (Pretrial Hearing concluded at 10:15 a.m.)
25

1 COURT REPORTER'S CERTIFICATE

2 THE STATE OF TEXAS)

3 COUNTY OF TARRANT)

4 I, Karen B. Martinez, Official Court Reporter in and
5 for the 372nd District Court of Tarrant County, State of
6 Texas, do hereby certify that the above and foregoing
7 contains a true and correct transcription of all
8 portions of evidence and other proceedings requested in
9 writing by counsel for the parties to be included in
10 this volume of the Reporter's Record, in the
11 above-styled and numbered cause, all of which occurred
12 in open court or in chambers and were reported by me.

13 I further certify that this Reporter's Record of the
14 proceedings truly and correctly reflects the exhibits,
15 if any, admitted by the respective parties.

16 I further certify that the total cost for the
17 preparation of this Reporter's Record is **located at the**
18 **end of Volume 21.**

19 WITNESS MY OFFICIAL HAND this the 30th day of March,
20 2015.

21 /s/ Karen B. Martinez

22 Karen B. Martinez, Texas CSR 6735
23 Expiration Date: 12/31/2015
24 Official Court Reporter
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